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FILED
IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

2007 JAN 22 P 3:12

ADELL CHANDLER
CIRCUIT CLERK
CABELL WV

JASON EASTHAM,

Plaintiff,

v.

CIVIL ACTION NO. 06-C-0948
(Judge John L. Cummings)

THE CITY OF HUNTINGTON, a Municipal
Corporation, and DAVID FELINTON,
Mayor for the City of Huntington,

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On this 12th day of January, 2007, came the Plaintiff, Jason Eastham, by counsel, Bert Ketchum, Esq. and Paul T. Farrell, Jr., Esq., of the Law firm GREENE KETCHUM, and City Attorney Scott McClure, Esq., on behalf of the City of Huntington and David Felington, Mayor, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, for oral argument on Plaintiff's Motion for Summary Judgment. The Court, having considered arguments of counsel, reading the memoranda filed herein and for matters more fully sated on the record, the Court hereby makes the following Findings of Fact and Conclusions of Law:

1. The above-styled civil action was brought pursuant to the Uniform Declaratory Judgment Act, W.Va.Code § 55-13-1, et seq., and requests the Court to declare the rights, status and legal relations arising out of The Charter of The City of Huntington, West Virginia and Article 202 §202.10 of the Codified Ordinance of the City of Huntington and other relevant residency requirements for employees and appointees of the City of Huntington, West Virginia.

2. Plaintiff, JASON EASTHAM, is a resident of Huntington, West Virginia, and is a civil service employee hired by City of Huntington as a firefighter after July 1, 2002.

3. The Charter of the City of Huntington, West Virginia, §14.3 and Article 202 § 202.10 of the Codified Ordinance of the City of Huntington impose a residency requirement whereby “[a]ll officers and employees of the City of Huntington employed after July 1, 2002 by the City are hereby required as a condition of their continued employment to have their place of abode in the City of Huntington, Cabell and Wayne Counties, and to be bona-fide residents therein [...]”

4. The City Charter further states that “There shall be no exception or waiver of the requirements contained in this section and any violation of any requirement contained herein shall result in termination of employment or appointment and a vacancy in the respective office or position.” Huntington, W.Va., City Charter §14.3.

5. The City Ordinance further states that “Failure of any officer, employee or appointee in the classified civil service of the unclassified positions of the City of Huntington to comply with the provisions of this section shall result in the immediate discharge from the City Service.” Huntington, W.Va., City Ord. art. 202 §202.10(d) (19).

6. Article III § 10 of the West Virginia Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

7. All permanent civil service employees have a property interest arising out of the statutory entitlement to continued, uninterrupted employment and are entitled to due process.

Swiger v. Civil Service Comm’n, 179 W.Va. 133, 365 S.E.2d 797, 800 (W.Va. 1987).

8. Due process mandates that civil service employees must be afforded a predisciplinary hearing prior to discharge, suspension, or reduction in rank or pay [...] unless exigent circumstances

preclude such a predisciplinary hearing. Black v. City of Huntington, 187 W.va. 675, 421 S.E.2d 58, 63 (W.Va. 1992) (modified for other reasons).

9. Violation of the City of Huntington's residency requirements do not give rise to exigent circumstances.

10. The City of Huntington's residency requirements do not afford permanent civil service employees or appointees, who are in violation of the residency requirements, due process which contradicts the protection provided by Article III ' 10 of the West Virginia Constitution.

11. Generally, an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. See Morton v. Godfrey L. Cabot, Inc., 134 W.Va. 55, 63 S.E.2d 861 (W.Va. 1951).

12. W. Va. Code §8-5-11 [1969] expressly authorizes a municipal corporation to enact residency requirements for municipal officers and employees as follows:

Subject to the provisions of this State, the provisions of this article, and other applicable provisions of this chapter, any city may by charter provision, and the governing body of any municipality, consistent with the provisions of its charter, if any, may by ordinance, determine and prescribe the officers or positions which are to be filled by election, appointment of employment, the number, method of selection, tenure, qualifications, residency requirements, powers and duties of municipal officers and employees, and the method of filling any vacancies which may occur. (emphasis added).

13. The power delegated to cities by W. Va. Code §8-5-11 is not plenary, however, and is subject to "other provisions of this chapter." See Morgan v. City of Wheeling, 205 W.Va. 34, 516 S.E.2d 48, 51-52 (W.Va. 1999).

14. Accordingly, the Supreme Court of Appeals of West Virginia held that W. Va. Code §8-5-11 “provides express authorization to municipal corporations, subject to the provisions of the Constitution of this State, the provisions of article 14, chapter 8 of the West Virginia Code, and other applicable provisions of Chapter 8, to, by ordinance, prescribe residency requirements for municipal officers and employees including municipal police officers.” Morgan v. City of Wheeling, 516 S.E.2d at 55.

15. Thus, the residency requirement is subject to the police civil service act found in W. Va. Code § 8-14-6 et seq., the firefighter civil service act found in W. Va. Code § 8-15-11 et seq., as well as the municipal police officers and firefighter procedure for investigation found in W. Va. Code § 8-14A-1 et seq.

16. The Morgan Court expressly found the City of Wheeling’s residency requirement to be consistent with the police civil service act and, therefore valid. Morgan v. City of Wheeling, 516 S.E.2d 55.

17. However, The City of Huntington goes one step further by mandating the “immediate discharge” of any city employee in violation of the residency requirement. Huntington, W. Va., City Charter §14.3, City Ordinance §202.10(d).
City Ordinance ' 202.10(d).

18. The “immediate discharge” of a city employee was not an issue in Morgan v. City of Wheeling. Rather, the City of Wheeling ordinance simply provided that failure to comply with the Wheeling residency requirement “shall be cause for that employee’s removal or discharge from the City service.” Morgan v. City of Wheeling, 516 S.E.2d at 51 (citing Wheeling City Ordinance 9046(d)).

19. The "immediate discharge" of a city police officer without a civil service hearing directly conflicts with and is inconsistent with the police civil service act which states:

No member of any paid police department subject to the civil service provisions of this article may be removed, discharged, suspended or reduced in rank or pay except for just cause, which may not be religious or political, except as provided in section nineteen of this article; and no such member may be removed, discharged, suspended or reduced in rank or pay except as provided by the civil service provisions of this article, and in no event until the member has been furnished with a written statement of the reasons for the action. In every case of such removal, discharge, suspension or reduction, a copy of the statement of reasons therefor and of the written answer thereto, if the member desires to file such written answer, shall be furnished to the policemen's civil service commission and entered upon its records. If the member demands it, the commission shall grant a public hearing, which hearing shall be held within a period of ten days from the filing of the charges in writing or the written answer thereto, whichever shall last occur. At the hearing, the burden shall be upon the removing, discharging, suspending or reducing officer, hereinafter in this section referred to as "removing officer", to show just cause for his or her action, and in the event the removing officer fails to show just cause for the action before the commission, then the member shall be reinstated with full pay, forthwith and without any additional order, for the entire period during which the member may have been prevented from performing his or her usual employment, and no charges may be officially recorded against the member's record. The member, if reinstated or exonerated, shall, if represented by legal counsel, be awarded reasonable attorney fees to be determined by the commission and paid by the governing body. A written record of all testimony taken at the hearing shall be kept and preserved by the commission, which record shall be sealed and not be open to public inspection unless an appeal is taken from the action of the commission.

W. Va. Code §8-14-20(a).

20. The "immediate discharge" of a city firefighter without a civil service hearing directly conflicts with and is inconsistent with the firefighters civil service act which states:

No member of any paid fire department subject to the civil service provisions of this article may be removed, discharged, suspended or reduced in rank or pay except for just cause, which may not be religious or political, except as provided in section twenty-four of this article; and no such member may be removed, discharged,

suspended or reduced in rank or pay except as provided by the civil service provisions of this article, and in no event until the member has been furnished with a written statement of the reasons for the action. In every case of such removal, discharge, suspension or reduction, a copy of the statement of reasons therefor and of the written answer thereto, if the member desires to file such written answer, shall be furnished to the firemen's civil service commission and entered upon its records. If the member demands it, the commission shall grant a public hearing, which hearing shall be held within a period of ten days from the filing of the charges in writing or the written answer thereto, whichever shall last occur. At the hearing, the burden shall be upon the removing, discharging, suspending or reducing officer, hereinafter in this section referred to as "removing officer", to show just cause for his or her action, and in the event the removing officer fails to show just cause for the action before the commission, then the member shall be reinstated with full pay, forthwith and without any additional order, for the entire period during which the member may have been prevented from performing his or her usual employment, and no charges may be officially recorded against the member's record. The member, if reinstated or exonerated, shall, if represented by legal counsel, be awarded reasonable attorney fees to be determined by the commission and paid by the governing body. A written record of all testimony taken at the hearing shall be kept and preserved by this commission, which record shall be sealed and not be open to public inspection unless an appeal is taken from the action of the commission.

W. Va. Code § 8-15-25(a).

21. The "immediate discharge" of a city police officer or firefighter without a civil service hearing directly conflicts with and is inconsistent with civil service procedure for investigation which states:

(a) Before taking any punitive action against an accused officer, the police or fire department shall give notice to the accused officer that he or she is entitled to a hearing on the issues by a hearing board or the applicable civil service commission. The notice shall state the time and place of the hearing and the issues involved and shall be delivered to the accused officer no later than ten days prior to the hearing.

(b) When a civil service accused officer faces a recommended punitive action of discharge, suspension or reduction in rank or pay, but before such punitive action is taken, a hearing board must be appointed and must afford the accused civil service officer a hearing conducted pursuant to the provisions of article fourteen, section twenty, or article fifteen, section twenty-five of this chapter: Provided,

That the punitive action may be taken before the hearing board conducts the hearing if exigent circumstances exist which require it.

W. Va. Code § 8-14A-3(a) and (b).

22. The conflict and inconsistencies between the City of Huntington's residency requirements and the civil service act provisions are governed by W.Va.Code ' 8-15-27 [1969] which states:

All acts, whether general, special, local or special legislative charters, or parts thereof, in relation to any civil service measure affecting any paid fire department inconsistent with the civil service provision of this article, shall be, and the same are hereby repealed insofar as such inconsistencies exist. It is intended by the civil service provisions of this article to furnish a complete and exclusive system for the appointment, promotion, reinstatement, removal, discharge, suspension and reduction of all members of all paid fire departments in all municipalities. The status or tenure of all members of any paid fire department, which members were employed on the effective date of this article, shall not be affected by the enactment of this article, but all such members shall be subject to all civil service provisions of this article with like effect as if they has been appointed members hereunder.

W.Va.Code § 8-15-27 (emphasis added).

23. The counterpart of W.Va.Code ' 8-15-27 [1969], for police officers, is found at W.Va.Code §8-14-23 [1969].

24. The legislature may repeal any charter or law, under which municipalities may be created. Brackman's Inc. v. City of Huntington, 126 W.Va. 21, 27 S.E.2d 71 (W.Va. 1943).

25. A general repealer clause in a statute is only declaratory of what would be the legal effect of an act or law without the repealing provision, and its insertion indicates an assumption by the legislature that the act or law is repugnant prior to enactment. State ex rel. Thompson v. Morton, 140 W.Va. 207, 84 S.E.2d 791 (W.Va. 1946).

26. The City of Huntington has no authority to enact residency requirements in conflict

with or inconsistent with Chapter 8, Articles 14, 14A and 15 of the West Virginia Code. Such conflicts and inconsistencies are repugnant prior to their enactment and repealed by law.

27. The conflicts and inconsistencies between the City of Huntington's residency requirements, Article III §10 of the West Virginia Constitution and the provisions in Chapter 8, Articles 14, 14A and 15 of the West Virginia Code are governed by the Home Rule for Municipalities, West Virginia Constitution Article VI §39(a):

No local or special law shall hereafter be passed, incorporating cities, towns or villages, or amending their charters. The legislature shall provide by general laws for the incorporation and government of cities, towns and villages and shall classify such municipal corporations, upon the basis of population, into not less than two nor more than five classes. Such general laws restrict the powers of such cities towns and villages to borrow money and contract debts, and shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten of the Constitution of the State of West Virginia. Under such general laws, electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the state then in effect, or thereafter, from time to time enacted.

28. Plaintiff contends that the residency requirements, as applied to all employees and appointees, are void ab initio under Article VI §39(a) of the West Virginia Constitution. However, the protections argued for by the Plaintiff do not necessarily apply to non civil service employees.

29. The Charter of the City of Huntington, West Virginia at §14.6, Separability Clause, provides that "If any article, section, subsection, paragraph, sentence, clause or word of this Charter is for any reason held invalid or unconstitutional, such holding shall not affect the validity, constitutionality or application of any other portion of this Charter."

30. In determining the applicability of the City of Huntington's Separability Clause, this Court applies the test for determining a statute's severability: A statute must contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained. See Hinchman v. Gillette, 217 W.Va. 378, 618 S.E.2d 387 (W.Va. 2005).

31. The City of Huntington's residency requirements, if applied only to non civil service employees, are complete in themselves, capable of being executed and valid.

32. By agreement of all the parties and with the consent of this Court, Civil Action Number 06-C-949 was consolidated with the above-styled case for the purposes of this hearing and will be bound by any findings, rulings or orders issued herein.

Therefore, it is ORDERED that:

1. By operation of law, §14.3 of The Charter of the City of Huntington, West Virginia and Article 202 §202.10 of the Codified Ordinance of The City of Huntington are repealed and rendered void and unenforceable as they would apply to all civil service employees and civil service appointees of the City of Huntington, West Virginia.

2. The Court is unwilling to sit as a super-legislature and modify the City Charter or City Ordinance and conform their provisions to West Virginia law. Accordingly, the City of Huntington, West Virginia's entire residency requirements, as they would apply to civil service employees and civil service appointees of the City of Huntington, West Virginia, are *void ab initio*

and shall not be enforced as written.

3. Counsel for the Plaintiff, Jason Eastham, has waived all demands for payment of attorney fees and expenses and the same shall be honored.

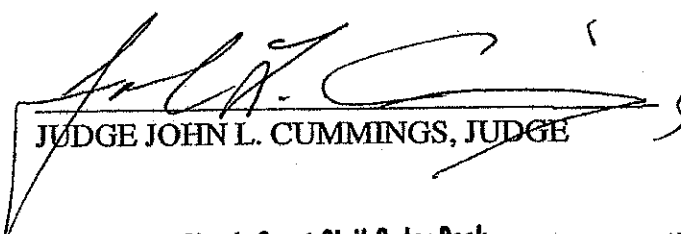
The Circuit Clerk of Cabell County is directed to distribute a copy of this Order to the following:

Bert Ketchum, Esquire
Paul Ferrell, Jr., Esquire
419 Eleventh Street
Huntington, West Virginia 25701

Scott McClure, Esquire
P.O. Box 1659
Huntington, West Virginia 25717

Greg Howard
P.O. Box 347
Barboursville, West Virginia 25504

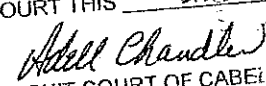
Entered this 22 day of January, 2007.


JUDGE JOHN L. CUMMINGS, JUDGE

ENTERED Circuit Court Civil Order Book

No. _____ Page _____ this

STATE OF WEST VIRGINIA
COUNTY OF CABELL,
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID,
DO HEREBY CERTIFY THAT THE FOREGOING IS
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON
GIVEN UNDER MY HAND AND SEAL OF SAID
COURT THIS JAN 22 2007


ADELL CHANDLER, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA